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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1315

COLORADO PUMP & SUPPLY COMPANY,
a Colorado corporation,
Petitioner,

VERSUS

FEBCO, INCORPORATED, a corporation; and THOMPSON PIPE & STEEL COMPANY, a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Where a manufacturer enters into a contract establishing a distributor for its products within a geographically defined territory in which contract there is no explicit restruction nor even any reference to sales by the distributor outside the territory, where the manufacturer makes no effort whatsoever to restrict territory and where competitive products are readily available in the market, is there, without more, a violation of the Shermna Anti-trust Act?

STATEMENT OF CASE

Febco, Incorporated (Febco), manufactures lawn and turf sprinkler equipment. Colorado Pump and Supply Company (Colorado Pump), and Thompson Pipe and Steel Company (Thompson), are competing wholesale distributors of such equipment in the Colorado area. A component of the sprinkling systems is the control device. Prior to January 16, 1967, Febco sold its equipment to both Colorado Pump and Thompson and to other distributors. Colorado Pump had a franchise agreement with Rainbird, a competitor of Febco, and limited its Febco purchases to controllers. Other controllers on the market were competitive with, and satisfactory substitutes for, the Febco controllers.

On January 16, 1967, Febco and Thompson entered into a written agreement whereby Thompson was appointed distributor of Febco equipment in a geographically defined area. (See Appendix E of Petition.) Title to the purchased product passed to Thompson at Febco's shipping point. Thompson also was obligated under the contract to perform certain duties as an agent in that it was to carry a complete line of lawn and turf equipment, provide engineering services to the installers and the users, and provide service to users of Febco products. Nothing in the contract prohibited or even mentioned sales by Thompson outside of the geographically defined area. No resale restrictions were placed upon Thompson by Febco. It had the right to purchase and carry other lines of equipment and it did so. Febco made no efforts whatsoever to insist upon resale restrictions and the testimony of representatives of the par-

ties was to the effect that there was no understanding of any restrictions whatsoever.

Colorado Pump could and did thereafter purchase Febco parts from Thompson at the same discounts given all other distributors and jobbers by Thompson.

Colorado Pump then brought this private anti-trust suit alleging violations of Sections 1, 2 and 14 of Title 15 U.S.C. and asking for treble damages. The United States District Court for the District of Colorado concluded that Febco and Thompson had not violated the Federal anti-trust laws. (See Appendix B of Petition.) Upon appeal to the United States Court of Appeals for the Tenth Circuit, the decision of the lower court was affirmed. (See Appendix A of Petition.)

ARGUMENT

I.

The decision of the Court of Appeals in the instant case is entirely consistent with the law as announced heretofore by the United States Supreme Court. The facts presented in this case do not reveal any vertical restrictions such as were present in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 363, 87 S.Ct. 1856 (1967). Nothing more is here presented than a vertical confinement of sales to a selected customer of a product which is competitively available from others.

The Court of Appeals said:

> "We have no explicit contract restriction. Nothing in the contract forbids, or even touches on, sales by Thompson outside of the territory. The trial court

found, and we agree, that the contract 'contained no resale restrictions with regard to whom Thompson could sell or at what price.' Further, no 'firm and resolute' action of Febco insisted upon observance of any territorial restriction. The Manager of the Irrigation Division of Thompson testified that although Thompson had not made sales outside of the allocated territory, it was not prohibited from doing so. The Manager of Febco testified that 'there was no authorization or no restriction to my knowledge' on Thompson sales outside of the territory." (Page iv of Appendix A to Petition).

That statement of the case is entirely consistent with *Schwinn* where at page 382 (87 S.Ct. at 1867) this Court said that where the manufacturer has parted with title and risk "his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of the Sherman Act." The *Schwinn* case is supportive of the decision in the instant case where at page 376 (87 S.Ct. at 1864) it is said:

> "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. Cf. United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restrictions, on these facts alone, would not violate the Sherman Act."

Where the manufacturer has parted with dominion over the article there may be a *per se* violation. In defining when a *per se* violation will be present the Court in *Schwinn* employed the words "effort thereafter to restrict territory" at page 382 (87 S.Ct. at 1867), and the words "to seek to restrict and confine areas or persons" at page 379 (87 S.Ct. at 1865). These words "restrict" and "restrict and confine" are a far cry from the word "authorize" in the Febco-Thompson contract and the words of the finding of the trial court "which made Thompson the exclusive distributor of Febco products in a geographically defined territory."

The words of *Schwinn* are restrictive or prohibitive whereas the words in the Febco-Thompson contract are words of grant, bestowing the distributorship upon Thompson.

The Petitioner wishes to ignore first that there is really no prohibitive language whatsoever in the distributor contract and secondly no firm and resolute policing of any exclusive territorial restrictions.

II.

The Petitioner has cited to this Honorable Court the Ninth Circuit Court of Appeals case of *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F.2d 21 (1971), as being in conflict with the Second Circuit in *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398 (1968), *cert. denied* 393 U.S. 938, and the Tenth Circuit in the instant case. *Beverage Distributors* is not in conflict. In *Beverage Distributors*, as in the other two cases, the Ninth Circuit

found no violation of the Sherman Anti-trust Act. The portion of *Beverage Distributors* most directly relating to this Petition in the instant case involved the question of whether two letters, both unsolicited, were evidence of an imposed resale restriction by the brewer upon the distributor. In deciding that question the Court looked at whether the letters constituted a contract or whether they constituted an "effort" to impose restrictions upon resale. One of the letters was from the distributor expressing its intention to follow a self-imposed restriction but reserving to itself the right to broaden distribution practices if the opportunity arose. The other letter was written by the brewer to the effect that it would like the distributor to continue to follow its indicated policy and asking only that it be contacted so that it might review the whole situation in the event of a change. The question was submitted to the jury which found no vertical territorial or customer restrictions. The Ninth Circuit Court of Appeals stated that the restriction, if any, was self-imposed with the distributor retaining the unlimited right to change its decision later and that the brewer had neither demanded nor requested any restriction upon resale.

Petitioner speculates that if the Court in *Beverage Distributors* determined the letter to be a contract the Court would have found a violation of the Sherman Act. The wording of the opinion at page 30, would indicate that the Petitioner is wrong:

> "The proposal which the new ownership of B.D.I. made in 1958 was one which left the initiative up to B.D.I. to suggest opportunities for a broader form of

distribution for B.D.I. Assuming arguendo that it was a continuing contract from day to day, or for a reasonable period, there is no evidence that B.D.I. ever requested or even suggested a policy change. On the contrary, there was evidence that other distributors did sell outside of their service areas and Olympia did did nothing about it. R.T. 1515-17. There is also evidence that other distributors could sell at prices which varied from the suggested prices and Olympia did not complain. R.T. 1568. The jury was justified in believing that B.D.I. was under no greater restraint."

The language quoted above makes it much more reasonable to conclude that had the language of the letters been embodied in a contract nevertheless the contract would not have been found to be an "explicit agreement" to restrict territory.

Additionally the Ninth Circuit Court of Appeals acknowledges that *Schwinn* is being read as narrowly as the appellant there could urge upon the Court.

How can the Circuits be said to be in disagreement when the facts and the issues are so dissimilar and the Court in the Ninth Circuit, as in ours, concluded that there was no violation of the Sherman Act?

CONCLUSION

For the reasons set forth herein, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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April, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon

Quiat and Quiat, P.C.
1045 First National Bank Building
Denver, Colorado 80202

All parties served by mailing such true and correct copies, postage fully prepaid, this _____ day of April, 1973.

_____